(8)

No. 08-1117

IN THE

Supreme Court of the United States

SCOTT DAVID BOWEN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY BRIEF FOR PETITIONER

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The State does not deny the extraordinary importance of the question presented. Nor can the State seriously dispute that this case perfectly showcases the uncertainties of non-unanimous verdicts. The overarching issue at trial was credibility. Indeed, the State's whole closing argument was designed to build credibility for an accuser whom the prosecutor himself described as a "runaway" methamphetamine user, with a history that demonstrated a "lack of trustworthiness." Tr. 370, 372. Faced with the kind of accusations capable of "overwhelm[ing] a decent person's judgment," *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2661 (2008), ten jurors sided with the State and two with petitioner. In forty-eight states, the jurors would have been required to continue deliberating toward consensus (and, as elaborated below, would eventually have declined to convict over one-third of the time). But because this case arose in Oregon, petitioner stands convicted.

Nor does the State dispute that this Court's recent Sixth and Fourteenth Amendment jurisprudence is largely inconsistent – and in some ways flatly incompatible – with the reasons the five-Justice majority in *Apodaca v. Oregon,* 406 U.S. 404 (1972), offered for allowing states to secure criminal convictions by non-unanimous jury verdicts. Instead, the State offers a partial defense of *Apodaca* and urges this Court to adhere to the outcome of that case on *stare decisis* grounds. But these arguments only serve to highlight the need for this Court to grant review in this case.

I. THE STATE FAILS TO OFFER ANY COGENT DEFENSE OF *APODACA*.

The five-Justice holding in *Apodaca* depends on two distinct legal propositions: (A) Justice Powell's conclusion that although "the Sixth Amendment requires a unanimous jury verdict," the Fourteenth Amendment does not incorporate that aspect of the Sixth Amendment against the states, *Johnson v. Louisiana*, 406 U.S. 356, 369-80 (1972) (Powell, J., concurring in the judgment); and (B) the plurality's conclusion that the Sixth Amendment itself does not require a unanimous verdict to convict someone of a crime. The State does not defend the former conclusion and only partly defends the latter.

A. It is striking, though perhaps not surprising, that the State does not defend Justice Powell's nonincorporation reasoning. This Court's modern incorporation (and more general due process) jurisprudence has shut the door to the notion that a constitutional right can be only partially incorporated against the states. *See* Pet. for Cert. 16-19. The State's refusal to defend the linchpin of *Apodaca's* holding is reason alone to grant certiorari.[1]

B. The plurality in *Apodaca* asserted that the Sixth Amendment does not require unanimity for

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[1] This is not the only case currently on this Court's docket that raises an incorporation issue. Three petitions for certiorari raising the question whether the Second Amendment's individual right to bear arms should be incorporated against the states are pending in this Court. *See National Rifle Ass'n v. City of Chicago*, No. 08-1497; *McDonald v. City of Chicago*, 08-1521; *Maloney v. Rice*, 08-1592.

two reasons: (1) "the Sixth Amendment does not require proof beyond a reasonable doubt"; and (2) the Sixth Amendment does not require any particular voting tally to render a guilty verdict. 406 U.S. at 410-12.

1. The State does not defend the plurality's conclusion that the Sixth Amendment does not require juries to find proof beyond a reasonable doubt. Nor could it, in light of this Court's unanimous holding after *Apodaca* that "the jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *see also Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007) ("the Sixth Amendment" requires jury verdicts "beyond a reasonable doubt, not merely by a preponderance of the evidence."). Thus, once again, granting certiorari is necessary to resolve a manifest inconsistency in this Court's cases that the State declines even to address.

2. The State rests its defense of the merits of *Apodaca* on a single proposition: that the Sixth Amendment does not require any particular voting tally to render a verdict of guilty beyond a reasonable doubt. The centuries-old unanimity rule, the State argues, is a "historical accident" that is purely "formalis[tic]" in nature – and thus is not properly regarded as constitutional. BIO 7, 16. This argument, however, fails on several levels.

First, the State's conception of the Sixth Amendment contravenes this Court's own precedent. In *Andres v. United States*, 333 U.S. 740 (1948), this Court held – consistent with several prior pronounce-

ments – that "[u]nanimity is required in jury verdicts where the Sixth and Seventh Amendments apply." *Id.* at 748; *see also American Pub. Co. v. Fisher*, 166 U.S. 464, 467-68 (1897) (Seventh Amendment requires unanimity in civil cases); Pet. for Cert. 9 (citing other cases expressing this understanding of Sixth Amendment). While the State says that *Andres* reached this decision "rather summarily," BIO 12 n.2, it nonetheless reached it.

Nothing in *Apodaca* undercut this precedent. To the contrary, five Justices in *Apodaca* reaffirmed that when the Sixth Amendment applies, it requires a unanimous verdict. *See Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment); *id.* at 395 (Brennan, J., dissenting). Every federal court of appeals to have considered the issue since thus has concluded that *Andres* remains good law.[2]

The State, like the (outvoted) *Apodaca* plurality, protests that the "legislative history" of the Sixth Amendment calls into question whether the Framers truly intended to preserve the common law's unanimity requirement. BIO 15 (quoting *Apodaca,* 406 U.S. at 409). But as this Court has noted, "[i]t is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing

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[2] *See, e.g., United States v. Russell*, 134 F.3d 171, 177 (3d Cir. 1998); *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998); H*Sincox v. United States*, 571 F.2d 876, 878-79H (5th Cir. 1978); *United States v. Smedes*, 760 F.2d 109, 111-12 (6th Cir. 1985); *United States v. Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987); *United States v. Savage*, 7 F.3d 1435, 1439 (9th Cir. 1995); *United States v. Hernandez-Garcia*, 901 F.2d 875, 877 (10th Cir. 1990); *United States v. Ginyard*, 444 F.3d 648, 652 (D.C. Cir. 2006).

right, rather than to fashion a new one." *District of Colombia v. Heller,* 128 S. Ct. 2783, 2804 (2008). And modern academic research concerning the jury at common law and at the time of ratification has confirmed that one cannot draw any conclusions from the removal, or absence, of specific references to the "accustomed requisites" of rights codified in the Sixth Amendment. *See, e.g., Barbara Shapiro, Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* 9-38 (1991). The best evidence of the Sixth Amendment's meaning thus remains the understanding of the right to jury trial when the Amendment was adopted, which even the *Apodaca* plurality acknowledged included a unanimity requirement. 406 U.S. at 408-09.

Second, this Court's post-*Apodaca* jurisprudence makes clear that details of the Sixth Amendment are binding even when those details are supposedly "formalistic." The Sixth Amendment codifies "specific" rights "that were the trial rights of Englishmen." *Giles v. California*, 128 S. Ct. 2678, 2692 (2008); *see also* Pet. for Cert. 12-15. A unanimity requirement was one of those rights. *See* 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769).

Third, even if "formalistic" elements of the right to jury trial were constitutionally nonbinding, there is nothing formalistic about the Sixth Amendment's unanimity requirement. It bears repeating Justice (then Judge) Kennedy's explanation why this is so:

> The dynamics of the jury process are such that often only one or two members express

> doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). The Sixth Amendment's unanimity requirement, in fact, plays such an indispensable role in criminal trials that a defendant cannot even waive it. *Id.*; *accord United States v. Pachay*, 711 F.2d 488, 491 (2d Cir. 1983) (agreeing with several other circuits to this effect).

The State contends that "[r]ecent empirical research" shows unanimity is not so important after all. BIO 20. But if there is any message resoundingly delivered by the cascade of *amicus* briefs in this case – from sources as varied as the American Bar Association, experts in academia, and criminal justice organizations – it is that recent empirical research confirms just the opposite: a unanimity requirement is a vital component of our system of trial-by-jury. What is more, the most recent work on this score indicates that almost two-thirds of felony convictions in Oregon involve non-unanimous votes on at least one count. *See* Jury Experts' Amicus Br. 7; OCDLA Amicus Br. 4. So the practical problems

raised by Oregon's and Louisiana's non-unanimity schemes infect jury deliberations on a daily basis in those states.

None of literature the State cites gives any reason for doubting these expert analyses. Citing one academic article and one student comment defending non-unanimity, the State suggests that the goal of its system is to accept the results of lopsided, yet divided, "first ballot[s]," while avoiding "time [that] is often spent trying to convince one or two holdouts." BIO 22. But the compilation of empirical studies that the State cites confirms that such first ballots regularly fail to produce guilty verdicts in states that require unanimity: Initial 10-2 ballots (the determinative tally in this case) result in guilty verdicts in unanimity regimes only *64.7%* of the time. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 692 (2001) (Table 6), *cited in* BIO 22. Even when such initial ballots in unanimity regimes lead to hung juries instead of outright acquittals, statistics show that prosecutors respond by dismissing the charges over 20% of the time, and when defendants are retried, they are acquitted in 45% of bench trials and nearly 20% of jury trials. National Center for State Courts, *Are Hung Juries a Problem?,* 26-27 (2002). The idea, therefore, that non-unanimity schemes do not affect deliberations and ultimate verdicts is refuted by the State's own authority.

Lest there be any doubt, the State's own law gives away its true view toward its non-unanimity scheme. Oregon, like Louisiana, exempts first-

degree murder from its non-unanimous jury system. Or. Const. art. I, § 11; *see also* La. C. Cr. P. Art. 782(A). The only conceivable reason for doing so is to require more careful deliberations and greater certainty before punishing someone for that grave offense. For all other crimes, these two states have decided – as the Oregon Supreme Court forthrightly has put it – "to make it easier to obtain convictions." *State ex rel. Smith v. Sawyer*, 501 P.2d 792, 793 (Or. 1972). This Court should make it clear that the Constitution prohibits such action.

II. THE STATE'S *STARE DECISIS* ARGUMENT IS UNPERSUASIVE.

The State's *stare decisis* argument fares no better than its defense of *Apodaca* itself. Just last Term, this Court explained that considerations in favor of *stare decisis* are at their nadir "in cases . . . involving procedural and evidentiary rules" because such rules do not produce "reliance" like substantive rules do. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (quotation marks and citation omitted). This is all the more so when, as here, the procedural holding at issue is constitutional in nature, and when the holding is an aberration among an otherwise harmonic body of jurisprudence. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2734 (2007) (Breyer, J., dissenting).

The State nonetheless insists that it has relied on *Apodaca*. BIO 9. But neither Oregon nor Louisiana has reconfigured its criminal justice system in response to *Apodaca*. Indeed, the State cannot point to a single state policy (other than the non-unanimity policy at issue here) or legal doctrine

that depends upon *Apodaca*. Nor could the State plausibly assert that it would be difficult to switch to a unanimity system on a prospective basis. In short, the States of Oregon and Louisiana stand in exactly the same position as they did in 1972.

The State also cites a handful of decisions from this Court that have mentioned *Apodaca* and recited its holding. BIO 9-10. But it does not cite a single decision or legal doctrine that depends on the continued constitutionality of states' allowing non-unanimous verdicts. Nor has the federal government or any other state acted in reliance on *Apodaca*.

Oregon and Louisiana, therefore, remain the sole national outliers, engaging in a practice that flouts several hundred years of Anglo-American legal heritage and the continuing public perception of the fair administration of justice. It is hard to imagine a less compelling case for *stare decisis*.

In any event, even if the State could point to any legitimate *stare decisis* concerns here, those concerns would be at most grist for debate at the merits stage. They would not dispel the need to grant certiorari. Given how this Court's jurisprudence has severely undercut *Apodaca*'s logic in recent years, it behooves this Court to address *Apodaca* head-on and to lay to rest once and for all whether *Apodaca* should remain good law.[3]

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[3] That the courts in Oregon and Louisiana are unable to put this issue to rest (*see* Pet. for Cert. 29-30) was recently confirmed by the Louisiana Supreme Court, which rejected a constitutional challenge to that state's non-unanimity rule on the ground that only this Court may announce *Apodaca*'s demise. *State v. Bertrand*, 6 So.3d 738, 743 (La. 2009).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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